

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

117th Session

Judgment No. 3318

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. D. G. against the Food and Agriculture Organization of the United Nations (FAO) on 7 May 2012, the FAO's reply of 17 August, the complainant's rejoinder of 24 September and the FAO's surrejoinder of 3 December 2012 as corrected on 11 January 2013;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant entered the service of the FAO at grade P-3 in April 1983, under a short-term contract, and was granted a continuing appointment in 1991. At the material time, he was a Senior Statistician at grade P-5 in the Country Statistics Service of the Statistics Division, under the Economic and Social Development Department – a post he had held since January 2008.

On 13 March 2009 the complainant filed a complaint of harassment against two of his supervisors, on the basis of the provisions of Administrative Circular No. 2007/05 concerning the policy on the

prevention of harassment (hereinafter referred to as “the circular”). He considered that they had adopted an “objectionable or unacceptable” attitude towards him that had “demean[ed]” and “belittle[d]” him, “caus[ing] personal humiliation” and “embarrass[ing]” him. He stated that despite the fact that he had been acting as chief of service between 2004 and 2007, he had never been granted a D-1 grade, and that in December 2007, the post of Chief of the Global Statistics Service – which he had been occupying on an ad interim basis – was given to a colleague following a competition organised to fill the position. Furthermore he complained that since his appointment as Senior Statistician, no work had been assigned to him. He requested equitable compensation for the injuries he claimed to have suffered throughout 2008 and to be appointed to a position with at least a P-6 grade to “restore his dignity”. A few days later, the complainant refused a proposal to reassign him to the FAO Regional Office for Asia and the Pacific, and he added this matter to his harassment complaint. On 30 April 2009 the two supervisors accused of harassment by the complainant replied to this complaint.

On 7 May the harassment complaint was referred to the Investigation Panel which, in its report dated 26 October 2009, concluded that these two supervisors had not intended to humiliate the complainant and that, even if that had been the case, he had never told them that their behaviour was offensive, in breach of the provisions of the circular. Although the Panel recognised that an awkward situation had arisen in the Statistics Division, it took the complainant to task for having contributed to this situation. After the parties had submitted their comments on the report in question, the Director of the Human Resources Management Division informed the complainant, in a memorandum dated 11 February 2010, that he accepted the conclusions of the Investigation Panel.

As his appeal lodged with the Director-General on 1 March 2010 was dismissed as unfounded, the complainant brought the case before the Appeals Committee. In its report of 6 May 2011, the Committee unanimously concluded that “leaving a high-level, competent official, who has considerable experience, without any real work for such a

long period [wa]s a sign of bad and irresponsible management”, and a majority of its members held that the complainant had been “excluded and professionally isolated” and harassed. The majority recommended that the complainant should be granted compensation for moral damages and that a disciplinary measure should be imposed on one of the supervisors involved in the case. Furthermore, the Committee unanimously recommended that the FAO should take the necessary measures and actions so as better to address this type of situation. The Director-General dismissed the appeal in a letter dated 16 December 2011, which constitutes the impugned decision. Referring to the case law of the Tribunal, he criticised the Appeals Committee for having substituted its own findings of fact for those of the Investigation Panel. Meanwhile, on 30 June 2011, the complainant retired from the Organization.

B. The complainant notes that the Director-General did not cite any legal precedents to support his assertion that the Appeals Committee should not substitute its own findings of fact for those of the Investigation Panel. Referring to the FAO Manual, section 331, he submits that the Committee is not bound by those findings. He maintains that the Committee did not deviate from the facts as established by the Investigation Panel, but merely assessed them differently: although both bodies acknowledged that there had been occupational exclusion, their opinions differed as to whether this could be considered an act of harassment or not. Given that no work had been assigned to him, in breach of the case law recalled in Judgment 2360, the complainant considers that he was a victim of harassment within the meaning of the circular.

Furthermore, the complainant submits that he cannot be taken to task for failing to comply with the terms of the circular, because he had informed one of his supervisors that his behaviour was offensive during the two interviews he had with him on 6 February and 27 October 2008. The complainant asks the Tribunal to order the FAO to impose a disciplinary measure on one of the supervisors targeted by the complaint and to award him 200,000 United States dollars in compensation for moral injury, as well as costs.

C. In its reply, the FAO states that the Appeals Committee was not competent to challenge the fact-findings of the Investigation Panel. On this point, it refers to Judgment 2295 and points out that neither the Appeals Committee nor the complainant has proved that the Investigation Panel committed a manifest error in its assessment. Referring to the Investigation Panel's report, it emphasises that the fact that the complainant was not assigned any work does not, in this case, constitute harassment, especially since he was absent on many occasions in 2008 and refused to do the work entrusted to him, or performed it in an unsatisfactory way.

Furthermore, the FAO states that the complainant did not inform his supervisors of the inappropriate nature of their behaviour during the interviews he had with them on 6 February and 27 October 2008, but merely complained that he had not been promoted. Citing the case law of the Tribunal, it affirms that it is not necessary to prove that there was an intention to intimidate, insult, harass, abuse, discriminate or humiliate in order to establish that harassment has occurred. In this particular case, the behaviour of the complainant's supervisors was merely a reaction to the attitude he had adopted, and although there may have been "shortcomings" in the area of management and supervision, this cannot be equated with harassment.

Lastly, the FAO notes that although there had been some difficulties in setting up the Investigation Panel, it had subsequently conducted its work promptly and thoroughly.

D. In his rejoinder the complainant presses his pleas. He points out that the Investigation Panel did not submit its report within the three-month period stipulated in the circular, which began on 7 May 2009, and he contends that the investigation was not carried out in a very thorough way. He also states that Judgment 2295 is not relevant and that, in accordance with section 303.1.341 of the Staff Rules, the Appeals Committee could question the fact-findings of the Investigation Panel.

E. In its surrejoinder the FAO reiterates its position, maintaining that the decision of 11 February 2010 which closed the investigation proceedings was taken “within a perfectly reasonable time frame”. It considers that the impugned decision was fully justified given that the investigation yielded nothing to support the view that the complainant had been subjected to harassment within the meaning of the circular.

CONSIDERATIONS

1. The complainant joined the FAO in 1983 as a statistician at grade P-3 in the Statistics Division. On 1 December 1988 he was promoted to grade P-4, and on 1 September 2000 to the position of chief of the Basic Data Branch at grade P-5. Throughout 2006 and 2007 he was Acting Officer-in-Charge of the Global Statistics Service. His application for the position of Chief of this new service was nevertheless turned down at the end of 2007, and he did not obtain the promotion to grade D-1 that he wanted. In January 2008 he was reassigned to the position of Senior Statistician in the Country Statistics Service without a change in his grade. He retired on 30 June 2011.

2. On 13 March 2009 the complainant lodged a complaint of harassment with the Director of the Human Resources Management Division, in which he criticized the behaviour of two of his supervisors, alleging that since his reassignment in January 2008, they had not ceased to demean, belittle and cause him personal humiliation with a view to excluding him. He asked to be granted equitable compensation for all injury suffered during 2008 and to be appointed to a post of at least P-6 grade.

On 18 March 2009 his supervisor proposed him a transfer, without a change in his grade, to the Regional Office for Asia and the Pacific in Bangkok, which he refused on the grounds that there was no reason for this transfer.

On 7 May 2009 the complaint of harassment was submitted to the Investigation Panel set up under the Administrative Circular No. 2007/05 of 23 January 2007 concerning the policy on the prevention of

harassment (hereinafter “the circular”). On 19 June 2009 the complainant was informed that the investigation process had not yet been initiated due to the unavailability of the panel members. As the Panel had not submitted its report within the three-month period provided for under the circular, the complainant lodged an internal appeal against what he considered to be an implicit rejection of his harassment complaint. He withdrew this appeal on 6 September 2009 once the Investigation Panel had started its work.

In its report of 26 October 2009, the Investigation Panel noted that the charges of harassment made by the complainant were unfounded. There had been a situation which prompted him to believe that he was being excluded, but this was as much due to his own behaviour as to that of his supervisors. On 11 February 2010 the Director of the Human Resources Management Division endorsed the findings of this report and refused the complainant’s request to interview further witnesses.

The complainant filed an appeal against that decision with the Director-General, but it was confirmed by the Assistant Director-General of the Corporate Services, Human Resources, and Finance Department. On 12 May 2010 the complainant submitted the matter to the Appeals Committee, reiterating the claims in his harassment complaint and further requesting that disciplinary action should be taken against one of the two supervisors whose behaviour he had contested. On 6 May 2011 the Appeals Committee made the following recommendations:

“The Committee, in its majority, concluded that the complainant was professionally excluded and isolated and subjected to harassment as defined by Administrative Circular No. 2007/05. A minority on the Committee [...] considered that the complainant’s professional exclusion and isolation were not comparable to harassment and rejected the complainant’s charge.

As regards the human resources and financial management at the Division level, all the members of the Committee concluded that leaving a high-level, competent official, who has considerable experience, without any real work for such a long period is a sign of bad and irresponsible management, which cannot be justified either for the complainant or the Organization.

The Committee considered it important for the Organization to conduct an in-depth analysis of this situation in order to prevent a similar one from occurring in the future.

The majority of the members of the Committee, who concluded that the complainant had been the victim of acts of harassment, recommends:

1. Financial compensation for the complainant for moral injury, the amount of which shall be established by the Organization; and
2. A disciplinary measure against [one of the complainant's supervisors], commensurate with his attitude of harassment and poor administrative management of the Organization's human and financial resources, in the form of a written censure in accordance with [section] 330.2.1 [of the FAO Manual]; and

All the members of the Committee agreed to recommend that the Organization should take all the necessary measures and actions to deal with this type of situation as soon as it arises, without waiting for it to become unmanageable. Indeed, the Administrative Circular 2007/05 clearly states: 'The Organization's strategy is to place the emphasis on prevention through awareness-raising and training.' In the case examined, the intervention of an external third party would have been useful and might have helped to limit the injury suffered by the complainant, as well as the losses of the Division's and Organization's resources, time, energy and expertise.”*

3. On 16 December 2011 the Director-General decided not to follow these recommendations and to dismiss the complaint of harassment. The grounds for this decision were that the Appeals Committee had wrongly substituted its own assessment for that of the Investigation Panel and had, furthermore, confused the concepts of harassment and poor personnel management. The complainant had held a proper administrative position and from the outset he should have approached his supervisors to ask them to change their behaviour, which, from the evidence gathered, did not seem to have been intentional.

That is the impugned decision.

The complainant primarily requests that the Organization be ordered to pay him compensation in the amount of 200,000 United States dollars and to adopt a disciplinary measure against one of the

* Registry's translation.

supervisors involved, which is “commensurate with his attitude of harassment and his poor administrative management of human and financial resources”.

4. The Appeals Committee adhered to the facts established by the Investigation Panel. The majority of its members came to different conclusions than those reached by the Investigation Panel, considering that these facts, in particular “the complainant’s continuous exclusion from work, his isolation and the offensive behaviour of [one of his supervisors]”, were not only indicative of administrative shortcomings but “were tantamount to the conditions explicitly spelled out in the circular [...] defining a situation of harassment”.

5. In its reply, the Organization maintains that the Director-General was right in considering that the Appeals Committee had overstepped its mandate. To support this view it merely refers to the case law concerning the limitations to which the Tribunal’s own power of review is subject. In so doing, it commits an error in law. As a matter of fact, the power of such a review body extends to the overall re-examination of all matters submitted to it and is not subject to the same restrictions that might apply to the judicial review by the Tribunal. The only exception to this is if the rules governing the review body provide for such restrictions. Neither paragraph (c) of Part II of the circular nor the provisions of the FAO Manual contain such restrictions.

Furthermore, the Appeals Committee did not, in any event, challenge the facts established by the Investigation Panel. It merely gave another interpretation to the provisions of the circular defining the concept of harassment.

6. Paragraph (c) of Part I of the circular defines harassment as follows:

“[A]ny improper behaviour by a person that is directed at, and is offensive to, another individual and which the person knew or ought reasonably to have known would be offensive. It comprises objectionable or unacceptable conduct that demeans, belittles or causes personal humiliation or

embarrassment to an individual. Mildly offensive comments or behaviour can rise to the level of harassment if they are repeated; a single incident can be considered harassment if it is so severe that it has a lasting negative impact on the individual(s) concerned.”

This text then specifies:

“Although harassment may occur more often between persons of different levels of authority it may also occur between peers. When behaviour of this kind is engaged in by any person who is in a position to influence career or employment conditions (including hiring, assignment, contract renewal, performance evaluation or promotion) of the recipient, it also constitutes an abuse of authority.

Harassment can take many different forms and may include among others:

- degrading tirades by a supervisor or colleague;
- continual unjustified and unnecessary comments or deliberate insults related to a person’s professional competence;
- threatening, abusive or insulting comments, whether oral or written;
- deliberate desecration of religious and/or national symbols;
- malicious and unsubstantiated complaints of misconduct, against other employees;
- mimicking, making fun or belittling;
- continual interference with a person’s work space, work materials, equipment, etc.;
- continual and unfounded refusal of leave application or training;
- display of posters, pictures, electronic images or written materials which are offensive, obscene or objectionable;
- continual exclusion of a person or group from normal communication, work or work related social activities;
- unreasonable intrusion into a person’s private life, such as unnecessarily seeking to communicate with that person outside office hours or when they are at home, or repeatedly asking inappropriate questions about personal affairs.”

This definition is based on the elements that the Tribunal’s case law has retained to assess whether or not harassment has occurred (see Judgment 2553, under 5 and 6).

7. This question must be determined in the light of a careful examination of all the objective circumstances surrounding the acts complained of. There is no need to prove that the perpetrator of these

acts intended to engage in harassment (see Judgment 2524, under 25), the main factor being the perception that the person concerned may reasonably and objectively have of acts or remarks liable to demean or humiliate him/her. The Tribunal's case law has always recognised that an allegation of harassment has to be borne out by specific facts, the burden of proof being on the person who pleads it, it being understood that an accumulation of events over time may be cited in support of such an allegation (see Judgments 2100, under 13, and 3233, under 6). An unlawful decision or inappropriate behaviour are not enough to prove that harassment has occurred (see Judgment 2861, under 37).

8. It has been established that the complainant, who holds a doctorate and worked for the Organization for more than 30 years, always fulfilled his professional obligations and carried out the tasks assigned to him to the satisfaction of everyone. His situation within the Organization deteriorated seriously in 2008 when his application for a senior position, which he had held on an ad interim basis for approximately two years, was turned down. He then took sick leave, home leave and leave without pay for a period of several months. When he returned, and although he had been appointed Senior Statistician in January 2008 – without a change in his grade – he found himself without any real work or, in the words of the impugned decision, his supervisors were unwilling to support his work. The Investigation Panel itself noted that the complainant's supervisors intentionally did not assign him work, deduced from the statements made by one of them. The proposal to transfer him to Bangkok, when he was nearly 60 years of age and had spent most of his career in Rome, was, in this context, entirely inappropriate. The Organization does not deny that a situation compromising the efficient running of the service continued for some time and that the officials targeted by the complaint of harassment failed in their duty to manage this situation correctly.

Although it does not accuse the complainant of misconduct, the Organization nevertheless attributes part of the responsibility for the sudden deterioration in working relations to him. However, it admits that his behaviour stemmed from a feeling of frustration that arose

after he was not selected for a post which he had been filling on an ad interim basis.

It was entirely predictable that an official, seeing his last chance of being promoted to the D category slipping away, shortly before his retirement, might have this reaction. In this context, his immediate supervisors should normally have been aware that he would be particularly sensitive to any lack of respect shown to him, and they should have tried to avoid making him feel that he was no longer of any use or excluded, compounding this impression with disparaging remarks and making a proposal which they should have known from the outset would be unacceptable to him. Although there is nothing in the file to suggest that the supervisors concerned intentionally set out to unsettle the complainant, the fact remains that taking all the circumstances of the case into account, their behaviour was not only contrary to sound administrative management but also liable to undermine and humiliate the complainant. Given the precarious situation that arose, the complainant cannot be blamed, contrary to what the Organization maintains, for not taking action to change this behaviour. By allowing this situation to persist, the FAO adopted an unacceptably passive stance and therefore failed in its duty of care.

It must be concluded that this is a case of harassment as defined under paragraph (c) of Part I of the Circular.

9. The complaint must be allowed on these grounds and the impugned decision set aside.

10. However, the finding of the existence of harassment, which has been reached at the end of proceedings to which the persons called into question are not party and in which they have therefore been unable to comment, may not under any circumstances be used against them in any context other than that of the instant judgment.

11. The complainant is entitled to an award of damages, which shall be set *ex aequo et bono* at 30,000 United States dollars, for all injuries suffered.

12. However, the claim for disciplinary measures against one of the supervisors implicated in the complaint cannot be granted. Indeed, such a request is, in any event, outside the Tribunal's jurisdiction. (See Judgments 2811, under 15, or 2636, under 13.)

13. As the complainant succeeds for the most part, he is entitled to costs, which shall be set at 5,000 dollars.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The FAO shall pay the complainant 30,000 United States dollars in damages for all injuries suffered.
3. It shall also pay him costs in the amount of 5,000 dollars.
4. All other claims are dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN
DRAŽEN PETROVIĆ